

Ky. Op. Atty. Gen. 10-ORD-213, 2010 WL 4635387 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

10-ORD-213

November 3, 2010

In re: Debbie Mason/Eastern Rockcastle Water Association

Summary: Because requester resides and works in the county where the records are located, [KRS 61.872\(3\)\(b\)](#) authorizes Eastern Rockcastle Water Association to require inspection prior to providing the requested copies assuming that suitable facilities are provided in accordance with [KRS 61.872\(1\)](#); however, ERWA contravened [KRS 61.872\(3\)](#) in requiring requester to schedule an appointment for inspection as that constitutes an illegal restriction upon access.

Open Records Decision

At issue in this appeal is whether the actions of the Eastern Rockcastle Water Association in relation to Debbie Mason's September 24, 2010, request for a copy of its 2009 state, federal, and local tax forms violated the Kentucky Open Records Act. In a timely written response, "ERWA Staff" advised Ms. Mason that she may "call to schedule an appointment to view the 2009 tax forms in our office." Specifically, the agency indicated that she could review the records between the hours of 1:30 p.m. and 3:30 p.m. on October 5, 6, or 12. Ms. Mason initiated this appeal shortly thereafter, alleging that ERWA creates a "hostile environment" in which to inspect records "which makes it necessary" for her "to obtain copies of" the requested 2009 tax forms. With regard to whether the agency has provided "suitable facilities" within the meaning of [KRS 61.872\(1\)](#), or created a hostile environment which subverted the intent of the Act short of denial under [KRS 61.880\(4\)](#), this office is unable to rule in either party's favor given the absence of any *objective* proof regarding this issue. Because Ms. Mason resides (and presumably works) in the county where the records are located, [KRS 61.872\(3\)\(b\)](#) authorizes ERWA to require inspection prior to providing the requested copies assuming that suitable facilities are provided; however, ERWA contravened [KRS 61.872\(3\)](#) in requiring Ms. Mason to schedule an appointment for inspection as that constitutes an "illegal restriction" upon access.

In support of her position that ERWA has previously created a hostile environment and that is why she requested copies, Ms. Mason alleged that "ERWA clerks [have] contact[ed] the Rockcastle County Sheriff numerous times for absolutely nothing and Carolyn Hinton's [(ERWA clerk) husband,] Danny Hinton [,]" has been at "the ERWA Livingston office every time we are near that area" and is "confrontational because he was escorted out of the Annual Meeting for verbal assaults against Gary Mason...." Upon receiving notification of Ms. Mason's appeal from this office, attorney Jerry J. Cox advised that "the statements of Debbie Mason about Danny Hinton being confrontational" and regarding the allegedly "hostile environment fails [sic] to mention that her husband, Gary Mason, has been disruptive each and every time he has been to the office." Attached to Mr. Cox's response is a copy of an e-mail from Malinda Mays, Division of Water, to ERWA, advising someone named Dale that he and "Carolyn should not have to put up with Gary's visits and temper tantrums" and further indicating that she

“would consider getting a restraining order against him” that says “any and all communication done with ERWA be done via mail - no personal contact.” [FN1]

*2 With regard to whether ERWA would provide (or has provided) “suitable facilities” within the meaning of [KRS 61.872\(1\)](#), or instead create a hostile or intimidating environment which subverts the intent of the Act short of denial within the meaning of [KRS 61.880\(4\)](#), this office refers the parties to 02-ORD-094 and 03-ORD-183 (copies attached) for guidance, but declines to make a finding in light of the limited and conflicting evidence presented. The apparently contentious relationship between the parties has no bearing on this appeal. Rather, “[i]n rendering a decision under the Open Records Act, the Attorney General is not concerned with ‘heroes and villains’.... [but must] assume a modicum of good faith from both parties to an open records appeal: from the requester in formulating his request, and from the official custodian in providing the records which satisfy the request.” 93-ORD-15, p. 6; 07-ORD-179, p. 7.

That being said, this office finds that ERWA's response cannot properly be characterized as a denial of Ms. Mason's request. Resolution of this issue turns on the application of [KRS 61.872\(3\)](#), pursuant to which:

A person may inspect the public records:

- (a) During the regular office hours of the public agency; or
- (b) By receiving copies of the public records from the public agency through the mail. *The public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located* after he precisely describes the public records which are readily available within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing.

(Emphasis added). As the Attorney General has often recognized, the Open Records Act contemplates access to records “by one of two means: On-site inspection during the regular office hours of the agency, in suitable facilities provided by the agency, or receipt of the records from the agency through the mail.” 03-ORD-067, p. 4; 04-ORD-195. Thus, a requester who both lives and works in the same county where the public records are located may be required to inspect the records prior to receiving copies. *Id.* On the other hand, a “requester whose residence or principal place of business is outside the county where the public records are located may demand that the agency provide him with copies of the records, without inspecting those records, *if he precisely describes the records and they are readily available within the agency.* See, e.g., 95-ORD-52, 96-ORD-186.” *Id.*, p. 5.

On this issue, the analysis contained in 04-ORD-195, a copy of which is attached hereto and incorporated by reference, is controlling. Because Ms. Mason apparently lives and works in Rockcastle County (home address in City of Mt. Vernon and no evidence to suggest employed in another county), and the records being sought are located in Rockcastle County as well, Ms. Mason is unable to satisfy the threshold requirement of [KRS 61.872\(3\)\(b\)](#); accordingly, ERWA may require her to conduct on-site inspection of the records prior to furnishing copies. [FN2] See 08-ORD-132. In construing this provision, the Attorney General has consistently observed that [KRS 61.872\(3\)\(b\)](#) places a greater burden on requesters who wish to access public records by receipt of copies through the mail. 99-ORD-63, p. 3 (citation omitted). Although Ms. Mason seems to have also satisfied that burden, the Attorney General need not reach that issue as Ms. Mason is only required to satisfy the lesser standard of [KRS 61.872\(2\)](#) in order to conduct on-site inspection, which the agency, as noted, is authorized to require prior to providing her with copies. Our conclusion is, of course, premised on the assumption that ERWA will provide suitable facilities, *i.e.*, *not* a hostile environment, for inspection of the records. In light of this determina-

tion, the remaining question is whether ERWA erred in permitting Ms. Mason to review the records only during one of the designated time frames or, in other words, requiring her to have a scheduled appointment for inspection.

*3 In construing [KRS 61.872\(3\)](#), which mandates that public agency records be accessible by the public “during the regular office hours of the public agency,” this office has consistently recognized that “any attempt by a public agency to limit the period of time in which a requester may inspect public records places ‘an unreasonable and illegal restriction’ upon the requester’s right of access.” 02-ORD-094, p. 4 (citation omitted). The only recognized exception is when a public agency “has a very small complement of employees or restricted and irregular office hours,” neither of which has been established here. *Id.* Under those circumstances, the Open Records Act contemplates that the public agency and the requester will agree upon a mutually convenient time and place for the requester to inspect public records. *Id.*, pp. 4-5 (citation omitted). “In the interest of absolute clarity,” this office reiterates that Ms. Mason (or any requester) “cannot be required to make an appointment to inspect the records, inasmuch as such a requirement could be interpreted as an illegal restriction on access, but may make such an appointment as a reasonable accommodation to the [agency].” *Id.*, p. 5. See 02-ORD-094 and 03-ORD-183 (copies attached relative to [KRS 61.872\(1\)](#), see p. 2 of this decision). With this exception, ERWA cannot be said to have violated the Act in the disposition of Ms. Mason’s request *assuming* that ERWA provides her with *suitable* facilities (within the meaning of [KRS 61.872\(1\)](#) as construed in prior decisions) in which to inspect the records. [FN3]

A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to [KRS 61.880\(5\)](#) and [KRS 61.882](#). Pursuant to [KRS 61.880\(3\)](#), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Jack Conway
Attorney General

Michelle D. Harrison
Assistant Attorney General

[FN1]. This office also issued a notification to Rockcastle County Attorney William D. Reynolds, in accordance with office protocol, to afford him the opportunity to elaborate upon the agency’s position, but in response he merely advised that his office “has no knowledge of the request that I am aware of.”

[FN2]. If ERWA prefers to mail the records instead of requiring Ms. Mason to inspect prior to receiving the requested copies, which seems preferable to her as well, ERWA is authorized to require advance payment of the copying fee (\$.10 per page), including postage, in accordance with [KRS 61.874\(1\)](#) and (3) prior to mailing the copies.

[FN3]. By facsimile transmission dated October 23, 2010 (a Saturday), which this office received on Monday, October 25, 2010, (after this decision had already been submitted for internal review) Ms. Mason supplemented her appeal, noting that she is disabled (removal of her soft palate due to Adenoid Cystic carcinoma), and thus would “most definitely need a copy of my requests from the ERWA.” Attached to her October 23 letter is a letter from Gary Mason, in which he elaborated upon his wife’s claim that ERWA has created a hostile environment for inspection of public records, including when he attempted to view records on October 20. This office has no reason to question Mr. Mason’s veracity and some of his claims are troubling; some claims, on the other hand, even if entirely accurate, would not necessarily establish that unsuitable (even if less than ideal) facilities

were provided. Suffice it to say that nothing in the supplemental correspondence alters our legal analysis (see p. 2 of this decision) or the outcome of this appeal.

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